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Fresh & Easy Neighborhood Market, Inc. and United Food and Commercial Workers International Union.

Fresh & Easy Neighborhood Market, Inc. and Deana Kenon. Cases 28–CA–22520, 28–CA–22521, 28–CA–22670, 28–CA–22675, and 28–CA–22692,

April 28, 2011

ORDER GRANTING MOTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On January 31, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ finding that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected activity, creating an impression of surveillance of that activity, and maintaining an unlawfully broad no-distribution rule in its employee handbook. The Charging Party Union filed a motion for reconsideration with respect to the Board’s remedial order, and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In our underlying decision, we found that a remedial notice for all of the violations found should be posted at the Respondent’s stores in the Las Vegas area, where most of the violations occurred. We also found that a corporatewide notice should be posted at all of the Respondent’s other stores solely with respect to the unlawful no-distribution rule, because that rule appeared in the handbook for all of the Respondent’s employees and on the Respondent’s companywide intranet. 356 NLRB No. 85, slip op. at 1 fn. 1. We modified the judge’s recommended Order and notice accordingly.

In its motion for reconsideration, the Union points out that paragraph 2(a) of our modified Order reads, in pertinent part, as follows (emphasis added):

Within 14 days after service by the Region, post at each of its Las Vegas, Nevada area stores copies of the attached notice marked “Appendix A,” and at all of its other *area* stores copies of the attached notice marked “Appendix B.”

....

In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of *the stores involved in these proceedings*, the Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice to all current employees and former employees employed by the Respondent at any time since April 1, 2009.

The Union notes that appendix B, the corporatewide notice, is clearly not intended to be posted in the Respondent’s “other area stores” in Las Vegas, but rather at all of the Respondent’s stores located outside that area. In addition, the Union objects to the limitation of the second sentence, regarding mailing in the event of store closings, to stores “involved in these proceedings,” which covered the Las Vegas area. The Union points out that this implies that if a facility outside the Las Vegas area were closed there would be no duty to mail the corporatewide notice to former employees of that store. The Union adds that “the Company has shuttered a number of [other] stores.” The Union requests that the Order be modified to correct both of these defects.

In opposing the Union’s motion, the Respondent asserts that the Union has supported its motion with facts from outside the case record—specifically the “shuttering” of other stores—and that the motion is consequently improper. The Respondent further asserts, citing *Beverly Enterprises*, 326 NLRB 232 (1998), *enfd.* in part, vacated in part 227 F.3d 817 (7th Cir. 2000), that corporatewide remedies are justified only where a respondent is found to be a recidivist.

We find merit in the Union’s motion. First, even assuming that the Union’s reference to shuttered stores is procedurally improper (at least without supporting evidence), we are not barred from correcting the terms of our own Order to better express its remedial intent. Whether the Order requires such clarification does not depend on additional evidence.

Second, we find that the Union is correct with respect to both of the points it raises. We clearly did not intend the corporatewide notice, appendix B, to be posted at the “area” stores in Las Vegas, where appendix A will be posted, but rather at the Respondent’s other stores. Nor would it make sense to require a mailing of the corporatewide notice to former employees of stores outside Las Vegas when a store in Las Vegas has closed. Our intent was to require the mailing of appendix B to the respective former employees of closed stores outside Las Vegas.²

² Member Hayes would not require a mailing of appendix B to the former employees of closed stores outside Las Vegas.

¹ 356 NLRB No. 85.

Third, the Board's corporatewide remedies are not reserved only for recidivists. Such a remedy is permissible and necessary to ensure that all affected employees will be informed of the Respondent's violation and the nature of their rights under the Act. See, e.g., *Technology Service Solutions*, 334 NLRB 116, 117 (2001) (granting motion to expand notice posting).

ORDER

For those reasons, the Union's motion is granted, and the following shall be substituted for the Order we issued in our decision:

The Respondent, Fresh & Easy Neighborhood Market, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining in its employee handbook and on its company intranet site an unlawfully broad no-distribution rule prohibiting the distribution of literature on its premises for any purpose.

(b) Interrogating its employees about their union activities and sympathies.

(c) Creating an impression among its employees that their union activities were under surveillance.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at each of its Las Vegas, Nevada area stores copies of the attached notice marked "Appendix A."³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the

stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice to all current employees and former employees employed by the Respondent at such stores at any time since April 1, 2009.

(b) Within 14 days after service by the Region, post at all of its other stores copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any stores outside the Las Vegas area, the Respondent shall duplicate and mail, at its own expense, a copy of the appropriate notice to all current employees and former employees employed by the Respondent at such stores at any time since April 1, 2009.

3. The complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 28, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

³ If this Order is enforced by a judgment of a United States court of appeals, the words in each notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in each notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT coercively question you about your support for or activities on behalf of the United Food and Commercial Workers International Union (the Union), or any other union.

WE WILL NOT make it appear to you that we are watching to see whether you are involved in efforts or activities in support of the Union, or any other union.

WE WILL NOT maintain in our employee handbook or on our intranet site a no-distribution rule that prohibits you from distributing literature on our property for any purpose.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Federal labor law.

FRESH & EASY NEIGHBORHOOD MARKET, INC.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

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WE WILL NOT do anything that interferes with these rights.

WE WILL NOT maintain in our employee handbook or on our intranet site a no-distribution rule that prohibits you from distributing literature on our property for any purpose.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by Federal labor law.

FRESH & EASY NEIGHBORHOOD MARKET, INC.